No. 14864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable, the United States Court of Appeals for the Ninth Circuit and to the Honorable Albert Lee Stephens, James Alger Fee and Richard H. Chambers, Judges thereof:

Comes now the appellant in the above-entitled cause, and presents this, his Petition for Rehearing of the above-entitled cause and, in support thereof, respectfully shows:

That the opinion of this Honorable Court in this case is erroneous and is contrary to law in the following particulars:

I.

The Court erred in holding that the evidence supports a finding that Appellant was an accessory before the fact.

II.

In reaching its decision this Court has misapprehended, in a material way, the nature of the conversation between Appellants Madray and Opitz.

III.

The Court erred in its opinion in that, in affirming the conviction, it permitted the trier of fact to base inference upon inference in order to reach a factual conclusion.

Preliminary Statement.

Appellant appealed from a conviction of each of two counts of an indictment charging him with (1) conspiracy to counterfeit, and (2) counselling, inducing, and procuring one Shire to counterfeit. This Court's opinion is based upon the second count only; the Court did "not reach" the conspiracy count. The conviction on the second count was sustained on the theory that Appellant was an accessory before the fact.

While the distinctions between principals, aiders and abettors, and accessories before the fact have been abrogated by statute insofar as culpability and punishment are concerned, it is still necessary to apply the common law rules in order to determine whether, in a given case, a person actually is an accessory before the fact, and, therefore, guilty and punishable as a principal. The cases so hold (*Morei v. U. S.*, 6 Cir. 1942, 127 F. 2d 827, 830-831; *U. S. v. Peoni*, 2 Cir. 1938, 100 F. 2d 401), and it is clearly implicit in the statute that this is the intent of the Congress. In the 1948 revision of Title 18, U. S. Code, Section 2(a) provided that:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

It is significant that in 1951 the last portion of that section was amended to read:

"is *punishable as a principal.*" (Emphasis supplied.)

I.

The Court Erred in Holding That the Evidence Supports a Finding That Appellant Was an Accessory Before the Fact.

The Court cites four cases in support of its holding that "an accessory before the fact can work through an intermediary as well as with him who ultimately commits the principal crime." This can be conceded. However, it does not follow that a person becomes an accessory before the fact, and therefore "punishable as a principal" (18 U. S. C. Sec. 2 (a)), simply because he is shown to have associated with a person who in turn has associated with another person who has committed the principal crime.

Here the only evidence to support the judgment of conviction for counselling Shire was a conversation of appellant with Opitz and Madray, not Shire. That conversation was that "I (Madray) go to Sonora, Mexico, if we could get some counterfeit money and buy gold with it." [R. 97, 101.]

A mere statement such as this certainly does not constitute an association with the venture of printing and possessing counterfeit money some four months later, with which appellant was in no way connected by the evidence.

In three of the cases cited by the Court, namely: *Russell v. U. S.*, 5 Cir. 1955, 222 F. 2d 197; *Turner v. U. S.*, 9 Cir. 1953, 202 F. 523, and *Collins v. U. S.*, 5 Cir. 1933, 65 F. 2d 545, the evidence was overwhelming that the defendants actively participated in the commission of the crimes; in fact, they caused the crimes to be committed. As this Court said, in the *Turner* case, the appellant ". . .

was the planner, the instigator, and the intended beneficiary of the entire scheme. . . ." In each of those cases the "intermediaries" were actually the instruments used by the defendants in committing the crimes. In two of the cases the "intermediaries" were actually paid to perform their part of the transaction.

The remaining case cited by this Court, *Morei v. U. S.*, 6 Cir. 1942, 127 F. 2d 827, presents a factual situation remarkably similar to that of the case now before the Court and it is interesting to note that in the *Morei* case the Court *reversed* the conviction.

In the *Morei* case the evidence relied upon to fasten guilt upon Dr. Platt was a conversation, preceding the commission of the crime, in which Dr. Platt gave an "intermediary" the name of Morei as a man from whom he might secure heroin to dose horses in order to stimulate them in racing. The Court then said (127 F. 2d at p. 832):

> "This is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of selling or purchasing narcotics, either as principal, aider and abettor, or accessory before the fact."

In reaching its conclusion in the *Morei* case the Court reviewed the law as to the intent and "purposive association" necessary to make one an accessory before the fact. Adopting the language of authorities, and conceding that an accessory can act through an intermediary, the Court said (127 F. 2d at pp. 830-831):

> "A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage

> the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it. . . . Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of unlawful intention between him and the perpetrator of the crime."

Then, quoting from Judge Learned Hand in *U. S. v. Peoni,* 2 Cir. 1938, 100 F. 2d 401, the Court went on to say:

> ". . . all these definitions . . . (of aiders and abettors and accessories) . . . demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry the implication of purposive attitude toward it."

In the *Peoni* case, above, the Court of Appeals reversed a conviction under the counterfeiting laws. In that case the defendant was charged with being an accessory to the possession of counterfeit notes which were found in the possession of one who had bought them from another, who, in turn, had bought them from the defendant.

Appellant asserts that the decisions in the *Morei* and *Peoni* cases correctly state the law as to accessories, and had it been applied to the facts of the case at bar, the conviction must necessarily have been reversed. It appears that the Court must have misapprehended the evidence relating to the appellant Winger. In upholding this conviction, this Court's decision not only conflicts with the decisions of the other circuits but it also departs from the common law rules relating to accessories before the fact.

II.

In Reaching Its Decision This Court Has Misapprehended, in a Material Way, the Nature of the Conversation Between Appellants Madray and Opitz.

After stating that, "Any evidence of direct person to person contact between Winger and Shire, although they were not strangers, is rather flimsy—by itself certainly insufficient to uphold a conviction," the opinion of the Court holds that there was evidence of Winger counselling the intermediary, Opitz, in contemplation of the securing of counterfeit money and that the money was manufactured "according to the plan in which Winger originally counselled."

There is no evidence in the record in this case to support the assertion that money was manufactured "according to the plan in which Winger originally counselled." It is pointed out again that all that Winger said to Madray and Opitz (not to Shire) was "that I (Madray) go to Sonora, Mexico, if we could get some counterfeit money and buy gold with it." [R. 97, 101.] This is the only evidence upon which the Court, apparently, relied to connect appellant Winger with Shire, and it certainly does not support a conclusion that appellant was counselling the manufacture and possession of counterfeit money.

Thus it is clear that the Court has misapprehended the nature of the conversation between Appellant, Madray, and Opitz and has understood it to be a "plan" for the manufacture of counterfeit money in which Appellant counselled Opitz. A careful reading of the testimony as to that conversation, in the words of the government's

own witness [R. 97-101], and as summarized in Appellant's brief at page 8 and in Appellee's brief at page 2, shows that, at most, it is mere speculation as to what *could* be done *if* the parties had some counterfeit money. In the conversation there is nothing which can be interpreted as a plan for the manufacture of counterfeit.

III.

The Court Erred in Its Opinion in That in Affirming the Conviction It Permitted the Trier of Fact to Base Inference Upon Inference in Order to Reach a Factual Conclusion.

It is settled that an inference cannot be predicated upon another inference, a presumption cannot be superimposed upon another presumption, in order to reach a factual conclusion. Inferences can be based only upon proven facts or facts of which judicial notice can be taken.

Sapir v. U. S., 10 Cir. 1954, 216 F. 2d 722;

Direct Sales Co. v. U. S., 1943, 319 U. S. 703, 711;

Simon v. U. S., 6 Cir. 1935. 78 F. 2d 454, 456;

Curley v. U. S., C. A. D. C. 1947, 160 F. 2d 229, 232.

In its opinion this Court starts with the proven fact that Winger had a conversation with Opitz in which there was speculation as to what could be done if they had some counterfeit money. From this one fact relating to Appellant, the opinion finally holds that ". . . a trier of fact was entitled circumstantially to conclude that the money was manufactured according to the plan in which Winger originally counselled."

In order to reach this conclusion (*i.e.,* inference of ultimate fact) it would be necessary for the trier of fact to make the following inferences:

(1) That there was another or further conversation between Winger and Opitz in which the manufacture of counterfeit was discussed.

(2) That in such inferred conversation Winger incited or procured or encouraged that criminal act, or assisted or enabled it to be done, or engaged or counselled or commanded the principal (or Opitz) to do it.

(3) That *as a result of Winger's inferred "counselling"* Opitz did, in fact, seek out Shire in order to have the counterfeit manufactured according to the inferred plan, and

(4) That a community of unlawful intention existed between Winger, Opitz, and Shire, and

(5) That in printing the counterfeit Shire was actuated by, and responded to, the inferred "counselling" by Winger and Opitz.

Appellant submits that to permit the reaching of a factual conclusion in this manner is ". . . to establish a fact by building one inference upon another. This does not constitute substantial evidence to submit to . . ." a trier of facts. (*Simon v. U. S.,* 6 Cir. 1935, 78 F. 2d 454, 456.)

Conclusion.

It is respectfully submitted that the decision of this Honorable Court is erroneous in the several particulars heretofore set forth, to the detriment and prejudice of the Appellant in this case, and that Appellant is justly entitled to a reconsideration and to a rehearing in order

that he may fully and completely present the errors complained of, and that upon further consideration this Court may set aside the conviction of Appellant on each count of the indictment.

Respectfully submitted,

Charles H. Carr,
George E. Danielson,
Attorneys for Appellant.

Certificate of Counsel.

We, counsel for the above-named appellant, do hereby certify that in our judgment the foregoing Petition for Rehearing is well founded, fully justified, and that it is not interposed for delay.

Charles H. Carr,
George E. Danielson,
Attorneys for Appellant.